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No. 88-999

IN THE

Supreme Court of the United States

October Term, 1988

GUY FRACCOLA,

Petitioner,

against

THE CITY OF UTICA; ALFRED BRUNI, as Commissioner of Public Safety of the City of Utica; and LOUIS LAPOLLA, as Mayor of the City of Utica,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Brief for Respondents in Opposition to Writ of Certiorari

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25 pp

Questions Presented.

Whether with respect to the particular facts here involved Petitioner's employment was, as a matter of New York law, properly terminated?

Whether the procedure for termination under New York law of a public employee with a Constitutionally protected property right thereto complies with the due process clause of the Fourteenth Amendment to the United States Constitution?

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Statement of the Case.

Shortly after March 6, 1985, one Muhammed Hassan appeared in the office of Utica Public Safety Commissioner Alfred Bruni, to present a complaint about the actions of

certain police officers as occurring on the night of March 6, 1985. Respondent, Commissioner Alfred Bruni, had long before maintained an open door policy with respect to citizen complaints of police misconduct, as the Utica Police Department did not have an internal affairs division or other administrative branch suited for that purpose. The substance of the Hassan complaint, as developed in the record below, is summarized as follows.

Between January and March of 1985, Muhammed Hassan had been casually dating one Colleen Martin. Hassan himself was a foreign student, duly enrolled in the State University of New York's College of Technology at Utica, New York. Colleen Martin was the ex-girlfriend of Patrick Fraccola. Patrick Fraccola is the twenty-one-year-old son of Petitioner, Guy Fraccola. The relationship between Patrick Fraccola and Colleen Martin had been terminated by Colleen Martin shortly before her association with Hassan began. The circumstances of the breakup were clearly those of Patrick Fraccola being "jilted" and Patrick Fraccola thereafter publicly behaved in a sometimes violent, but constantly immature and disruptive manner whenever he came into contact with Colleen Martin.

This behavior on the part of Patrick Fraccola was frequently directed towards the Hassan-Martin relationship. It consisted of such things as accosting them in public places and using obscene language, following them around in his vehicle and screaming obscenities from the window, appearing at the residence of Muhammed Hassan with "bully" type friends and threatening Hassan, attempting to start fistfights in public places, and otherwise vascillating between the roles of lovesick fool and obnoxious punk.

Most disturbingly, Patrick Fraccola did during some of these escapades verbally assert the notion that because he was the son of a deputy police chief (Petitioner herein), he

could engage in such behavior in the City of Utica with impunity. All of these incidents occurred between January and March of 1985, and the details of Patrick Fraccola's conduct were repeatedly made known to Petitioner through the parents of Colleen Martin, Mr. and Mrs. Edward Martin, with the urging plea to do something to control his son's foolish behavior.

On March 6, 1985, Muhammed Hassan and a friend, Gary Cuda, went to the Sheraton Inn and Conference Center ("Sheraton") for dinner at approximately 9:00 p.m. By approximately 11:00 P.M. they had moved to the lounge area and were seated at a table. At this time they were met by some friends, including Colleen Martin and her girlfriends, Michelle Nicoletta, Terry Lee Cool, and her sister, Lisa Martin. At approximately 11:00 p.m., this group of people, who were clearly minding their own business in a social setting, looked over to the bar to see Patrick Fraccola staring at them intensely, and otherwise harassing them with posture and body language. Patrick Fraccola was then seen by Colleen Martin and other eyewitnesses making a telephone call shortly thereafter. Petitioner appeared at the Sheraton with two subordinate police officers, Investigators Louis Paciello and Wayne Gentile. At this time, Petitioner was off duty and had arrived at the Sheraton from home in response to a telephone call from his son. Investigators Paciello and Gentile were on duty at the time and had been requested by Petitioner to accompany him to the Sheraton. What happened thereafter, as testified to at the hearing below by Muhammed Hassan, and corroborated by eyewitnesses Tracy Chapman, Gary Cuda, Michelle Nicoletta, and Terry Lee Cool, was as follows.

The three police officers confronted Hassan in the lobby outside the lounge and Petitioner immediately grabbed him in an intimidating fashion and began asking him questions.

Petitioner Fraccola then escorted Hassan by the arm out of the Sheraton and was verbally abusive to him in the process. Hassan was then placed in a police vehicle and transported to the Utica Police Headquarters which is a short distance from the Sheraton. Hassan testified that while in the police vehicle he was struck in the face three times by Petitioner while Hassan was seated in the back seat and Petitioner was leaning over the front seat. He was then taken to a remotely located and secure office of the Utica Police Department which was located in the "jail" section of the police headquarters building, behind a steel barred area. He was met at this location by Officers Paciello, Gentile, and also Patrick Fraccola. He remained in this office for approximately one hour where he was repeatedly screamed at, poked, threatened, intimidated, and otherwise berated by Petitioner and his son, Patrick Fraccola. Hassan was threatened with deportation by Petitioner. He was also threatened by Petitioner with a beating. He was taunted and verbally abused by Patrick Fraccola in the presence of his father (Petitioner). He was forced to empty his pockets and otherwise submit to an illegal search. He was then transported back to the Sheraton and told by the officers to forget that this ever had happened. No charges were filed against Hassan as a result of this incident or any other behavior on his part.

After hearing this account from Hassan and taking a written sworn statement, the Commissioner of Public Safety assigned his investigator to interview all of the eyewitnesses to the incident. Interviews were conducted and written statements were taken of eyewitnesses, Tracy Chapman, Gary Cuda, Michelle Nicoletta, Terry Lee Cool, Lisa Martin, and Colleen Martin. Also interviewed were Colleen Martin's parents, Mr. and Mrs. Edward Martin.

As a result of this investigation, the Commissioner of Public Safety concluded, based on credible evidence and in

good faith, that Petitioner, and possibly Investigators Louis Paciello and Wayne Gentile, had committed very serious and egregious misconduct in that they grossly abused their powers as police officers for a purely personal end. Although this case has been repeatedly characterized by Petitioner as one of "alleged police brutality," the actual physical abuse sustained by Muhammed Hassan was insignificant compared to the psychological intimidation and overall outrageousness of Petitioner's behavior. Hassan has maintained throughout all proceedings that he was only struck three times by way of three quick blows to the face and his physical injuries were superficial.

The Commissioner of Public Safety felt compelled to refer this matter to all other appropriate agencies who may have jurisdiction, but for reasons unknown to Respondent, both the FBI Criminal Civil Rights Division and the Oneida County District Attorney's office, in the exercise of discretion, did not wish to become involved in this matter. As soon as it became apparent to Petitioner that he was being investigated for this misconduct, he began engaging in a calculated and deliberate behavior designed to confuse and mislead both the Commissioner and the public as to what truly happened on the night of March 6, 1985, and what had been occurring on the part of his son for the two months prior. During this period of time, Petitioner received the strong support of the local Police Benevolent Association and his immediate boss, the chief of police, who was Fraccola's good friend. Petitioner and Investigators Paciello and Gentile even challenged the Commissioner's authority to investigate the matter. This challenge ultimately was decided adversely to Petitioner by Decision of the Honorable John R. Tenney, J.S.C., in an action for declaratory judgment brought in New York State Supreme Court. This matter was not appealed. The Commissioner of Public Safety then decided that disciplinary charges pur-

suant to Section 75 of the Civil Service Law of the State of New York were clearly warranted based on the evidence uncovered, and proceeded on that course.

Because of the intense publicity surrounding this case, along with its overall seriousness, the Commissioner of Public Safety felt that a hearing officer, appointed pursuant to Section 75 of the Civil Service Law, should be as detached from the events as possible and should otherwise be possessed of superior qualifications. The Commissioner was then referred to John Clyne as a possible hearing officer. John Clyne is an attorney admitted to the Bar of the State of New York. He was a recently retired Albany County Court Judge.[1] He was (and presently is) a partner in the law firm of Casey, Yanas, Mitchell and Amerling of Albany, New York. John Clyne was not familiar with any of the events leading up to the charges. He did not know any of the officers. He did not know any of the charging parties or city officials. He was, in short, an experienced superior court judge whose reputation for competence and integrity was unimpeachable. The City of Utica, in designating Judge Clyne as hearing officer, had agreed to pay his fees regardless of the outcome of the case and had otherwise entrusted the evidentiary issues therein to Judge Clyne for report and recommendation in accordance with Section 75 of the Civil Service Law.

Judge Clyne conducted the Section 75 Administrative Hearing on February 24 through 28, 1986, in a courtroom at the Oneida County Courthouse, Utica, New York. The transcript in its entirety (as reviewed by all courts below), shows that he clearly maintained order and decorum

[1]County Courts in the State of New York are Superior Courts of general criminal jurisdiction and limited civil jurisdiction. Judges are elected to ten year terms. To qualify as a County Court Judge, a person must be an attorney, admitted to the Bar of the State of New York, with a minimum of five years experience.

throughout the proceedings, as a judge should, and frequently kept both Respondent's attorney and the Petitioner's attorney within the bounds of proper adversarial conduct.

At the hearing, Muhammed Hassan testified to all of the events as stated above in substantial detail. His testimony as to what happened at the Sheraton was corroborated by no less than five eyewitnesses. Additionally, witness Edward Martin testified to a very incriminating telephone conversation with Petitioner, occurring the day after the incident, in which Petitioner indicated that he "taught Muhammed Hassan a lesson, because no foreigner is going to harass his son."

Petitioner testified *twice* at the hearing and gave different accounts of what happened on each occasion of testimony. He first stated that Muhammed Hassan voluntarily accompanied him to the police station to discuss allegedly harassing telephone calls made to Petitioner's home. However, Petitioner admitted on cross-examination that he only had heard a voice on the telephone once for a very brief period of time and as a result of this testimony and other testimony, Judge Clyne found this story about the harassing telephone calls to be just that, a fabricated story concocted in an attempt to exculpate Petitioner.

The second time that Petitioner testified, he completely reversed his prior position and stated that he took Muhammed Hassan into custody to interrogate him with regard to these allegedly harassing telephone calls, and upon satisfying himself that the phone calls would stop, and the incidents with Patrick Fraccola were over, he released Hassan and did not pursue the matter further. This conflict in Petitioner's testimony, together with the incredible aspects of the story pertaining to the phone calls, prompted

Judge Clyne to state the following in his report and recommendation:

> I find that there was no legal justification for taking Hassan from the Sheraton and detaining him at the police station without his consent and that such conduct constitutes the crime of unlawful imprisonment in the second degree. *I find the testimony of Respondent Fraccola and his son, Patrick, concerning this incident, to be unworthy of belief and concocted to fit the occasion.* (Emphasis added.)

The written report and recommendation of Judge Clyne, mandated by Section 75 of the New York State Civil Service Law, is conveniently omitted from the Appendix to the Petition herein. However, it is set forth in full in the Appendix to this Brief. Judge Clyne's written report discusses the evidence, identifies the issues, and otherwise disposes of the matter in judicial, analytical style. It recommended that Petitioner be found guilty of several of the most serious charges set forth. It further recommended that Investigators Paciello and Gentile be found not guilty of the charges preferred against them. This recommendation was based on Judge Clyne's conclusion that Investigators Paciello and Gentile, as officers subordinate in rank to Petitioner were acting under direct or implied orders from Petitioner and were otherwise being coerced into doing what they did both during the incident itself and at the hearing. Petitioner's statements to the effect that the exoneration of Investigators Paciello and Gentile was the result of a different application of testimony than with respect to himself, are patently incorrect.

The Mayor of the City of Utica, Louis D. LaPolla, subsequently adopted Judge Clyne's report and recommendation in its entirety and entered a finding of guilty on the part of

Petitioner and not guilty on the part of Investigators Louis Paciello and Wayne Gentile. The punishment imposed upon Petitioner was dismissal. Judicial review of this administrative act was duly sought by Petitioner pursuant to Article 78 of the New York State Civil Practice Laws and Rules, resulting in the decisions below, as previously set forth.

Summary of the Argument.

The procedure by which Petitioner was terminated from his public employment complies with the due process clause of the United States Constitution, more specifically with the requirements most recently enunciated by this Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1984). All other issues raised in the case involve the application of State Law to the particular facts and as such, no valid reason exists for granting a Writ of Certiorari in accordance with Rule 17 of this Court.

ARGUMENT.

The procedure by which Petitioner was discharged from public employment complies with the due process clause of the United States Constitution. All other issues involve solely questions of applying state law to the particular facts of the case.

Petitioner correctly points out that a constitutionally protected property right in continued public employment must emanate from State Law. *Board of Regents v. Roth,* 408 U.S. 564 (1972). Yet, this Court has held that the due process clause of the United States Constitution regulates the procedure by which such a state created right may be deprived. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1984).

In this case the statute which sets forth the procedure by which a competitive civil servant[1] may be terminated is Section 75, New York Civil Service Law (the "state statute") as printed in full in the Appendix to Petition. The state statute has never, throughout all proceedings below, been alleged by Petitioner to be unconstitutional. An examination of the statute indicates that the procedural safeguards provided to a public employee in the State of New York are greater than what has been held by this Court to constitute the minimum appropriate due process as enunciated in *Loudermill, supra.* In *Loudermill* this Court indicated first that there must be notice and opportunity for a hearing prior to termination of employment, and some opportunity for the employee to present his side of the case prior to termination. *Id.* 542-543. However, this Court also noted, citing *Matthews v. Eldridge,* 424 U.S. 314 (1976) that "something less than a full evidentiary hearing may be sufficient prior to adverse administrative action. *Id.* at 545.

The state statute here provides an employee with greater procedural safeguards than required by this Court. First, the employee must be presented with written charges and given an opportunity to respond in writing (paragraphs 1 and 2). An evidentiary hearing must be held by either the person with power to remove or a designee. The employee has the right to be represented by counsel or a representative of an employee organization at such hearing (paragraph 2). The employee has the right to compulsory process for summoning witnesses on his behalf. The statute further expressly places the burden of proof upon the employer. The employee is even entitled to be provided with a transcript of the hearing at employer expense in order to assist the employee in seeking judicial review (paragraph 3). Most

[1]It is, and has been throughout the proceedings below, undisputed that Petitioner had a constitutionally protected right to his public employment.

importantly, the notice, charges and evidentiary hearing must precede termination or other administrative action against the employee.

In this case the state statute was meticulously followed by Respondents. Petitioner was afforded a full evidentiary hearing in which he was represented by counsel who vigorously cross-examined all of Respondent's witnesses, and presented detailed evidence in Petitioner's defense. The Hearing Officer made a written report and recommendation (as set forth in full in the Appendix hereto). The public employer adopted the Hearing Officer's report and recommendation in full and terminated Petitioner.

Petitioner's argument that he or his counsel should have been allowed participation in the deliberative stage of the adjudicatory proceeding after completion of the evidentiary hearing is without legal basis. (See p.13, Petition) Assuming, *arguendo,* that Petitioner's inability to "present his side of the story" to the Mayor after completion of the evidentiary hearing, but prior to administrative action, constitutes some sort of due process violation; any impact of this action on the total procedure is rendered moot by opportunity for judicial review of such administrative determinations pursuant to Article 78 of the New York Civil Practice Laws and Rules. Such judicial review is allowed as to both the administrative determination itself pursuant to the well known "substantial evidence" rule, and as to the punishment imposed upon the affected individual.[2]

[2]See New York Civil Practice Laws and Rules, Section 7803.

Petitioner fully availed himself of this procedure for judicial review and such procedure resulted in the decision below.[3]

Thus, the issues sought to be reviewed are limited to the unique facts of Petitioner's claim. It is unlikely to occur with any regularity. Petitioner does not even allege that other individuals are similarly situated to him. There is no reason to review such an individualized case in which the primary issue is the proper application of State Law.

There are no other special or important reasons for issuance of the Writ. Respondent respectfully requests that the Writ be denied.

CONCLUSION.

The Writ should be denied.

Dated: Utica, New York
January 18, 1989

Respectfully submitted,

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[3]The issue of the Mayor's taking administrative action before he received the hearing of transcript was discussed in detail by the New York State Supreme Court, Appellate Division Fourth Judicial Department (Petition, p.A-3). Petitioner's arguments were rejected. The Appellate Division further found, in applying a substantial evidence rule, that the Mayor's administrative determination was indeed supported by the evidence. This ruling by the Appellate Division was made upon review of the entire transcript and exhibits from the evidentiary hearing.

APPENDIX.

Report of Designated Hearing Officer John Clynes, Pursuant to Section 75 of New York State Civil Service Law.

DEPARTMENT OF PUBLIC SAFETY

BUREAU OF POLICE, UTICA, NEW YORK

IN THE MATTER OF THE CHARGES PREFERRED

against

GUY FRACCOLA, WAYNE GENTILE and LOUIS PACIELLO

The Commissioner of Public Safety of the City of Utica, New York, preferred charges against the respondent, Guy Fraccola, a Deputy Chief of Police of the City of Utica and simultaneously preferred charges against two police officers, Wayne Gentile and Louis Paciello. All three officers were represented by the same attorney, Rocco A. DePerno, and individually served answers to the respective charges which consisted of a general denial.

A hearing on the charges brought against the three officers was conducted before the undersigned, the designated hearing officer, on February 24-28, 1986. All respondents were represented at the hearing by Rocco A. DePerno. The Commissioner of Public Safety was represented by the Corporation Counsel of the City of Utica, Armand (*sic*) Festine.

The following witnesses were called by the charging Party:

Muhammed Hassan—the alleged victim
Tracy Chapman—a security guard at the Sheraton Inn
Gary Cuda—a friend of Hassan
John Murphy—who was at the Sheraton on March 6, 1986
Colleen Martin—a friend of Hassan
Ann Marie Martin—the mother of Colleen Martin
Terry Lee Cool—who was at the Sheraton on March 6, 1986
Michelle Nicoletta—who was at the Sheraton on March 6, 1985
Edward J. Martin, Jr.—the father of Colleen Martin
Alfred Bruni—the charging party

The respondents called the following witnesses:

Dominick C. Yacco—a member of the Utica Police Department
Christopher Burns—Utica Police Department
Nicholas J. LaBella—A captain in the Utica Police Department
Frank Giruzzi—Utica Police Department
Xavier Agrurra—an acquaintance of Hassan
David McLaughlin—an acquaintance of Hassan
Matthew Cuda—part owner of a restaurant
William J. Powers III—an assistant district attorney in Oneida County in March, 1985
Alfred J. Maunz—Utica Police Department
Robert Scully—Utica Police Department
David Kozyra—an acquaintance of Patrick Fraccola
Joan Fraccola—the wife of respondent Fraccola
Patrick Fraccola—the son of respondent Fraccola
Guy Fraccola—one of the respondents
Anthony J. Elacqua—Utica Police Department
Louis J. Paciello—one of the respondents
Wayne Gentile—one of the respondents

Guy Fraccola—was recalled
Barry M. Donalty—the district attorney for Oneida County
Bernie (*sic*) D. Rotundo—the Chief of Police of the City of Utica

and the following character witnesses:

Michael Bursh—Commissioner of Social Services, Herkimer County
Anthony LaPorta—Administrator, Utica Public Schools
Roger Smith—Customer Representative, Niagara Mohawk Power Corporation
Robert Barney—Chief of Safety and Security at Utica Psychiatric Hospital
Angelo Benadetto—Retired, Utica Police Department
J. Louis Kelly—Retired Police Commissioner, City of Utica

In addition, there were a number of exhibits received in evidence, together with the personnel records of the officers and at the request of the Corporation Counsel and the consent of the respondents' attorney, the hearing officer viewed the lounge-lobby area of the Sheraton Inn, the police station and the vehicle respondent Fraccola drove on March 6, 1985. The viewing was in the company of the attorneys for the parties.

The testimony reveals the following basic fact pattern: For some six weeks prior to March 6, 1985, Patrick Fraccola, the 20-year old son of Guy Fraccola, a Deputy Chief of the Utica Police Department, and and (*sic*) Muhammed Hassan, a 22-year old Jordanian who was a student at SUNY Utica, had been somewhat at odds over Patrick's former girlfriend, one Colleen Martin, age 22. On the evening of March 6, 1985, Hassan was at the lounge of the Sheraton Inn in the City of Utica with some friends, including Gary Cuda, and seated at a table next to Colleen Martin

who was with three other girls. Patrick Fraccola was also at the lounge that night. Shortly before 11:00 p.m., Patrick Fraccola placed a phone call to his father who was at home. Shortly after 11:00 p.m., Guy Fraccola, accompanied by Officers Gentile and Paciello, entered the Sheraton Inn, confronted Hassan in the lobby area, left the Sheraton with Hassan, and the Deputy Chief accompanied by Officer Gentile, drove Hassan to the Utica police station in an unmarked police car, brought him to a room on the second floor of the station where they were joined by Officer Paciello and Patrick Fraccola; had a discussion with Hassan for about an hour and then Hassan was returned to the Sheraton in a marked police car. No charges were placed against Hassan and the officers did not have an warrant for Hassan at any time.

The above is a capsule of the events which led to the charges and is basically conceded by all parties. There is considerable dispute concerning the details of the incident. Hassan contends, in substance, that he was forcibly removed from the Sheraton; was punched by Guy Fraccola; sustained a swollen lip and cuts on his face; that he was berated and intimidated both in the lobby and at the police station. The respondent Guy Fraccola initially took the position on the hearing that he was acting as a referee between his son and Hassan and that Hassan voluntaril (*sic*) accompanied him to the station house to discuss the problem; that he never struck Hassan and did not harass or intimidate him. After Gentile and Paciello testified, the Deputy Chief was recalled and took the position that there was probable cause for taking Hassan into custody on March 6, 1985; that the "discussion" at the police station was justified since he recognized Hassan's voice as the voice of the person making threatening calls to his home and that by releasing Hassan after his admission concerning the harassing phone calls, he was simply giving a young student a break.

The Respondent, Guy Fraccola

The respondent, Guy Fraccola, a Deputy Chief of the Utica Police Department, with over 26 years of service, testified that he was off duty at home on March 6, 1985, when he received a phone call from his son, Patrick, at about 10:50 p.m. who told his father that he was at the Sheraton Inn in the City of Utica and, while in the men's room, Muhammed Hassan and another guy told him to leave the Sheraton or they would kick his ass. The father told Patrick to wait and he would call him back. The father placed a call to the Criminal Investigation Division of the Utica Police but was not able to reach anybody in that unit. He called his son back and told him he'd be down. En route to the Sheraton, he spotted Officer Gentile, who was on duty in plain clothes and directed him to get in the car with him and on the way to the Sheraton, filled him in on the call from his son. Arriving at the Sheraton, they met Officer Paciello, who was on duty in plain clothes, and quickly filled him in as all three entered the Sheraton. They were met by Patrick and went to the lounge to locate Hassan. They did not see him there and were in the lobby area near the lounge when Hassan approached the group on his way back from the men's room. Patrick pointed out Hassan to his father who immediately went to Hassan.

The testimony of the witnesses as to what occurred thereafter varies considerably. I find from the credible evidence that respondent Fraccola grabbed Hassan by the arm and ordered him to come with him to the police station; that the officers identified themselves as police officers and used the authority of their office to take Hassan into custody and forcibly remove him from the Sheraton and transport him to a second floor office of the police station where he was subjected to verbal abuse and physical intimidation by respondent Fraccola in the presence of Officers Gentile and Paciello and Patrick Fraccola.

I find that while in the room respondent Fraccola repeatedly poked his finger into Hassan while yelling at him and using obscenities.

I find that there was no legal justification for taking Hassan from the Sheraton and detaining him at the police station without his consent and that such conduct constitutes the crime of unlawful imprisonment in the second degree. I find the testimony of respondent Fraccola and his son, Patrick, concerning this incident to be unworthy of belief and concocted to fit the occasion.

Based on the foregoing, I find the respondent Fraccola guilty of the following charges:

Charge #1—That Guy Fraccola engaged in conduct constituting unlawful imprisonment.

Charge #4—That Guy Fraccola engaged in conduct constituting harassment.

Charge #10—That Guy Fraccola is guilty of conduct constituting abuse of his authority as a police officer.

Charge #11—That Guy Fraccola is guilty of conduct unbecoming an officer.

I find that there is legally insufficient evidence to sustain the following charges:

Charge #5—that Guy Fraccola engaged in conduct constituting the act of menacing.

Charge #7—That Guy Fraccola engaged in conduct constituting criminal solicitation.

Charge #8—That Guy Fraccola engaged in conduct constituting conspiracy. (March 6, 1985)

Charge #9—That Guy Fraccola engaged in conduct constituting conspiracy. (Conspiring with Officers Gentile and Paciello re submitting false reports)

I find that, although respondent Fraccola had physical contact with Hassan, both in the police car immediately after leaving the Sheraton and again while in the second floor room at the stationhouse that such conduct did not

constitute the crime of assault (see definition of physical injury, Penal Law Section 10.00[9]) and, accordingly, I find respondent not guilty of Charge #2 that Guy Fraccola engaged in conduct constituting assault.

I find from the credible evidence that at the stationhouse on March 6, 1986, Hassan was required to empty his pockets and turn over certain ID to the officers present and accordingly, Guy Fraccola is guilty of conducting an illegal search as set forth in Charge #3.

According to the testimony of the three charged officers, Paciello was directed by Guy Fraccola to submit a special report concerning the incident with Hassan and such a report, dated March 7, 1985, (Exhibit 8) was completed prior to his going off duty at 1:00 a.m. on March 7, 1985. Thereafter Officers Gentile and Fraccola were directed by the Chief of Police to file special reports about the incident in the latter part of March, 1985, after the Chief of Police was made aware of the Commissioner of Public Safety's investigation. The report filed by Fraccola is dated March 6, 1985 (exhibit 7). A fair reading of that report, together with the special reports of Officers Gentile and Paciello, indicate that the report by Fraccola is designed to exculpate him for his conduct on the evening in question and is both misleading and untruthful. There is no mention in the reports of Gentile or Paciello of any discussion of harassing phone calls to the Fraccola home while at the Sheraton and the only mention of such calls in both reports relates to discussions at the stationhouse. Yet, Guy Fraccola's report, made several weeks after the incident, states as follows:

> When I started to talk to subject about the incident in the men's room, I recognized the voice as the same one which had been calling my home and talking dirty to my wife and making statements about my son. At this time, I told him I wanted to talk to him at police headquarters and did, in fact,

> bring him to our office at police headquarters. At police headquarters we had a discussion in regard to harassing telephone calls to my home and he admitted making the calls and promised me they would stop.

Actually, the discussion concerning the phone calls did not develop until Hassan was in custody at the police station. (Compare special reports of Gentile and Paciello.)

I find the evidence sustains Charge #6 that Guy Fraccola prepared and submitted a false report in the course of his duties as a Utica Police Officer.

Respondents, Gentile and Paciello

The evidence at the hearing clearly establishes that Officers Gentile and Paciello did not at any time verbally or physically abuse anybody and that both officers' participation in the events of March 6, 1985, were pursuant to a direct order from their Deputy Chief. Under all of the circumstances, I find insufficient evidence in the record to sustain any of the charges against said officers.

Recommendation

In determining the recommended penalty to be imposed upon respondent Fraccola, I have considered the personnel folder of the respondent, his years of service in the police department and his rank, i.e., Deputy Chief. I have also considered the nature of the charges and the background giving rise to the events of March 6, 1985, together with the special report filed by respondent concerning the matter. I have also considered the testimony of the character witnesses.

Respondent Fraccola abused his authority as a command officer in the Utica Police Department for purely personal motives. He enlisted the aid of two on duty, plain clothes officers to assist him in his private vendetta, who by their

very presence bolstered the apparent authority of the "badge". Without any basis in law, respondent Fraccola orchestrated the abduction of Hassan from a public place, transported him to police headquarters, intimidated and berated him and then released him—all for the purpose of "teaching him a lesson". Such conduct constitutes a clear abuse of authority and the role of law enforcement in our society. It undermines the integrity of the Utica Police Department specifically and detracts from public confidence in "police" generally. The position of the respondent subsequent to the matter being brought to the attention of the Commissioner of Public Safety and his testimony at the hearing only serve to compound the situation.

For the foregoing reasons, it is the recommendation of the undersigned that the appropriate sanction is dismissal of respondent, Guy Fraccola, from the Utica Police Department.

Addendum

During the course of the hearing, the attorney for the respondents was permitted to make inquiry concerning the bias and prejudice of the Commissioner of Public Safety as to respondent Fraccola. I find that the charges were preferred solely by reason of the complaint filed with the Commissioner and his subsequent investigation. In addition, the attorney for the respondents has urged that by virtue of the alleged bias and prejudice of the Commission of Public Safety, that this hearing officer should rule that the Commissioner is disqualified from ultimately deciding the matter. I do not believe that the hearing officer has the power to do so. However, it would seem that the prudent course in this case would be for the Commissioner to disqualify himself from rendering the final determination and to request that such determination be made by an appropriate official. (See *Matter of Hicks v. Fortier,* decided February 27, 1986, App. Div. 3rd Dept.)

As Justice Casey stated in that case:

> As to petitioner's claim concerning the role of respondent in filing the charges, testifying at the hearing and rendering the final determination, we are of the view that as a matter of propriety and because of his personal involvement, respondent should have disqualified himself from reviewing the recommendations of the hearing officer and acting on any of the charges. (See *Matter of Sanders v. Owens* 82 AD 2d 968; see also *Matter of Edgar v. Dowling; Matter of Ortez v. Lesser,* 83 AD 2d 663; *Matter of Martin v. Bates,* 65 AD 2d 818.)

Respectfully submitted,

Dated: March 21, 1986
Albany, New York

/s/JOHN J. CLYNE
John J. Clyne
Designated Hearing Officer